



# CITY OF LODI COUNCIL COMMUNICATION

**AGENDA TITLE:** Review Policy Regarding Invocations at Council Meetings

**MEETING DATE:** September 30, 2009

**SUBMITTED BY:** City Attorney

**RECOMMENDED ACTION:** Review Policy Regarding Invocations at Council Meetings and Consider Changes to the Council Protocol Manual.

**BACKGROUND INFORMATION:** The City of Lodi has agendized Invocations at its Council Meetings since at least 1975. In March of 2006, in response to a California Appellate Decision, *Rubin v Burbank*, (2006) 101 Cal. App.4<sup>th</sup> 1194, Council adopted as part of the Council Protocol Manual a policy requiring that prayers before the Council be non-sectarian. Since that time, invitations have been sent to all listed religious organizations in the phone book inviting them to give a non-sectarian invocation. However, that policy has not been followed by all of the individuals who have responded to the City's invitation.

On behalf of its Lodi members, the Freedom From Religion Foundation objected to the respondents' departures from the City's policy. The Foundation requests that the City follow the policy adopted as part of the Council Protocol Manual requiring that all prayers before the Council be non-sectarian, meaning that the prayer must not include words or references that reflect a particular religious belief. Council adopted this policy on the advice of the City Attorney's office, based on a California Appellate Court case, *Rubin v Burbank*. In *Rubin*, the City of Burbank argued that its prayers did not violate the Constitution because only twenty percent of the prayers referenced a particular religious belief. The Appellate Court disagreed stating that "any legislative prayer that proselytizes or advances one religious belief or faith or disparages any other violates the Establishment Clause [of the United States Constitution]." (Id. at 1204) The California Supreme Court declined to consider Burbank's appeal.

Notwithstanding the clarity of the California *Rubin* decision, the law on legislative invocations is highly unsettled. Although the *Rubin* Court based its decision on the Federal Constitution, California also has an "Establishment Clause" in its constitution. Nevertheless, California Courts often defer to Federal Courts on constitutional interpretations; therefore, California's establishment clause could be interpreted more broadly by California courts. At the federal level, opponents and proponents of invocations can and do vociferously point to federal appellate court cases in different jurisdictions that support their preferred outcome. The *Marsh v. Chambers* (1983) 463 U.S. 783, case is the only US Supreme Court case directly on point. In *Marsh*, the Supreme Court upheld a state legislature's practice of paying a Christian pastor to say a non-sectarian prayer before legislative sessions, but held that Invocations cannot be used to proselytize.

The issue of prayer before legislative sessions becomes muddier when you add the question of whether the prayers can be sectarian. The question is whether a prayer that simply references a particular religious tradition (i.e. is sectarian) without exhorting conversion or demeaning other faith traditions can

APPROVED:

Blair King, City Manager

be considered proselytizing under *Marsh*. Some courts see legislative prayer as government speech (*Rubin*, the California Appellate Court Case) that can and must be censored of all sectarian references. Others see it as private speech that should not be censored as long as the opportunity to pray is open to all. Which view, or whether a third and different view may ultimately prevail is unknown and unknowable.

As for Congress, they have no prayer rules or policy. According to the Senate Office of the Chaplain, they let all pastors pray according to their own conscience and have never been challenged. They are open to guest chaplains of all faiths though all appointed chaplains have been "Christian."

Given the fractured state of the law on the issue of Invocations, below is a continuum of possible Invocation policies:

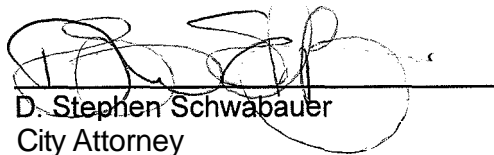
- 1) Remove Invocations from the Council Agenda. (The City could not censor or prohibit prayers from being said during Public Comment as long as they were directed at items within the jurisdiction of the City Council).
- 2) Prayers said privately for the benefit of individual or multiple Council Members prior to the meeting.
- 3) Continue Invocations subject to the City's existing Policy. (Prayer proponents could challenge this practice as censorship of their free speech rights though at least one federal appellate case (*Turner v. City Council of the City of Fredericksburg* (4th Cir. 2008) 534 F.3d 352), authored by retired Justice Sandra Day O'Connor rejected such a challenge finding that an agendized prayer was government not private speech.)
- 4) Allow uncensored Invocations with one or a number of the following measures to avoid any inference that one religion is favored over another:
  - a. Require Invocations to be given before the meeting is called to order.
  - b. Continue to actively encourage all religious traditions within Lodi to give Invocations before the Council.
  - c. Open the opportunity to give an Invocation to leaders of religious faiths that reside in Lodi but must travel outside of Lodi to find a house of worship (those of the Sikh, Jewish and other faiths).
  - d. Open the opportunity to give a Call to Civic Responsibility to non-religious groups.
  - e. Add a disclaimer to the Agenda that the Invocation is offered as an acknowledgement of the diverse religious traditions within Lodi and not as an endorsement of any particular religion or religious belief.
  - f. Prohibit Invocations that directly seek to convert or demean a particular religious belief or the lack thereof.

In addition to the options discussed above, the Alliance Defense Fund (ADF) offered their own model prayer policy along the lines of option 4 above and submitted an agreement under which ADF would provide a defense to the City to defend their model policy. As set forth below, accepting the offer from ADF as currently constructed is not advisable. First, Council must adopt ADF's policy verbatim. Second ADF's offer is only for defense, not indemnity (i.e. if the City were to lose in a litigation action and suffer

an attorney fee award, it would be the City's liability to pay the award.) This concern is exacerbated by the requirement that Council must give ADF discretion regarding litigation strategy. As such, Council could find itself in the untenable position of paying for a judgment where it had no say in the direction of the litigation. Finally, ADF only commits to defending the case through trial. Public interest litigation of this sort rarely if ever settles at the trial level. For the above reasons, ADF's current offer does not provide any meaningful financial support if the Council chose to adopt ADF's proposed policy.

**FUNDING:** N/A

**FISCAL IMPACT:** Potential Litigation Costs.



D. Stephen Schwabauer  
City Attorney

## **POLICY REGARDING OPENING INVOCATIONS BEFORE MEETINGS OF THE LODI CITY COUNCIL**

**WHEREAS**, the Lodi City Council (“the Council”) is an elected legislative and deliberative public body, serving the citizens of Lodi, California; and

**WHEREAS**, the Council wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

**WHEREAS**, the Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

**WHEREAS**, our country’s Founders recognized that we possess certain rights that cannot be awarded, surrendered, nor corrupted by human power, and the Founders explicitly attributed the origin of these, our inalienable rights, to a Creator. These rights ultimately ensure the self-government manifest in our Council, upon which we desire to invoke divine guidance and blessing; and

**WHEREAS**, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

**WHEREAS**, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected a challenge to the Nebraska Legislature’s practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars, and specifically concluded, “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.” *Id.*, at 786; and

**WHEREAS**, the Council desires to avail itself of the Supreme Court’s recognition that it is constitutionally permissible for a public body to “invoke divine guidance” on its work. *Id.*, at 792. Such invocation “is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.” *Id.*; and

**WHEREAS**, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), “Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” *Id.*, at 675; and

**WHEREAS**, the Supreme Court further stated, that “government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging

the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.” *Id.*, at 693 (O’Connor, J., concurring); and

**WHEREAS**, the Supreme Court also famously observed in *Zorach v. Clauson*, 343 U.S. 306, (1952), “We are a religious people whose institutions presuppose a Supreme Being.” *Id.*, at 313-14; and

**WHEREAS**, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that the American people have long followed a “custom of opening sessions of all deliberative bodies and most conventions with prayer...,” *Id.*, at 471; and

**WHEREAS**, the Supreme Court has determined, “The content of [such] prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-795; and

**WHEREAS**, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies “to embark on a sensitive evaluation or to parse the content of a particular prayer” offered before a deliberative public body. *Id.*; and

**WHEREAS**, the Supreme Court has counseled against the efforts of government officials to affirmatively screen, censor, prescribe and/or proscribe the specific content of public prayers offered by private speakers, as such government efforts would violate the First Amendment rights of those speakers. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 588-589 (1992); and

**WHEREAS**, in *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4<sup>th</sup> Cir. 2004), *cert. denied*, the United States Court of Appeals for the Fourth Circuit recently reviewed and specifically approved as constitutional the prayer policy of a county board, and made a number of key findings about said policy; and

**WHEREAS**, the Council is not bound by decisions of the Fourth Circuit, but hereby acknowledges the general guidance provided by the most important of that court’s findings in *Simpson*, including the facts that the policy there:

(1) Allowed for invocations for the benefit of the legislative body itself “rather than for the individual leading the invocation or for those who might also be present,” *Id.*, at 284; and

(2) Established a practice in which various clergy in the county’s religious community were invited on a rotating basis to present invocations before meetings of the board, *Id.*, at 279; and

(3) Thus, “made plain that [the county board] was not affiliated with any one specific faith” by allowing different persons from different religious convictions and backgrounds to offer the invocations. *Id.*, at 286; and

**WHEREAS**, the Fourth Circuit showed little concern that the prayers before board meetings in *Simpson* were “traditionally made to a divinity that is consistent with the Judeo-Christian tradition,” *Id.*, at 280, because “*Marsh* also considered, and found constitutionally acceptable, the fact that the prayers in question fit broadly within ‘the Judeo-Christian tradition.’” *Id.*, at 283 (quoting *Marsh*, 463 U.S. at 793); and

**WHEREAS**, the Fourth Circuit’s ruling in *Simpson* can be distinguished from its earlier decision in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4<sup>th</sup> Cir. 2002), *cert. denied*, where a town council “improperly ‘exploited’ a ‘prayer opportunity’ to ‘advance’ one religion over others.” *Id.*, at 298 (quoting *Marsh*, 463 U.S. at 794); and

**WHEREAS**, the Council intends to avoid all of the unique circumstances that rendered the practices at issue in *Wynne* unconstitutional, including the facts that:

(1) The Town Council’s resolution declared its intent that “the Town’s prayers are not just for the Council members but for all of the Town’s citizens,” and thus prayers were “directed at” the citizenry, *Wynne*, 376 F.3d at 301, n.7; and

(2) The Town Council “steadfastly refused” to invoke any “deity associated with any specific faith other than Christianity,” *Id.*, at 300, n.5; and

(3) The Town Council “advance[d] its own religious views in preference to all others,” *Id.*, at 302; and

(4) Town Council members publicly chided and “ostracized” those who refused to participate in their prayers, *Id.*, at 298; and

**WHEREAS**, the Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

**WHEREAS**, the Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

**WHEREAS**, the Council accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States Constitution.

**NOW, THEREFORE, BE IT RESOLVED** by the Lodi City Council that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. In order to solemnize proceedings of the Council, it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council.

2. The prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.

3. No member or employee of the Council or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

4. The prayer or invocation shall be voluntarily delivered by an eligible member of the clergy in the City of Lodi. To ensure that such person (the “invocation speaker”) is selected from among a wide pool of Lodi’s clergy, on a rotating basis, the invocation speaker shall be selected according to the following procedure:

a. The Clerk to the Council (the “Clerk”) shall compile and maintain a database (the “Congregations List”) of the religious congregations with an established presence in the local community of Lodi.

b. The Congregations List shall be compiled by referencing the listing for “churches,” “congregations,” or other religious assemblies in the annual Yellow Pages phone book(s) published for Lodi, research from the Internet, and consultation with local chambers of commerce. All religious congregations with an established presence in the local community of Lodi are eligible to be included in the Congregations List. Any such congregation not otherwise identified for participation may request its inclusion by specific written communication to the Clerk.

c. This policy is intended to be and shall be applied in a way that is all-inclusive of every diverse religious congregation in the community of Lodi. The Congregations List is compiled and used for purposes of logistics, efficiency and equal opportunity for all of the community’s religious leaders, who may themselves choose whether to respond to the Council’s invitation and participate. Should a question arise as to the authenticity of a religious congregation, the Clerk shall refer to criteria used by the Internal Revenue Service in its determination of those religious organizations that would legitimately qualify for Section 501(c)(3) tax-exempt status.

d. The Congregations List shall also include the name and contact information of any chaplain who may serve one or more of the fire departments or law enforcement agencies of Lodi.

e. The Congregations List shall be updated annually, by reasonable efforts of the Clerk.

f. Within thirty (30) days of the effective date of this policy, and annually each calendar year thereafter, the Clerk shall mail an invitation addressed to the “religious leader” of each congregation listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.

- g. The invitation shall be dated at the top of the page, signed by the Clerk at the bottom of the page, and read as follows:

*Dear religious leader,*

*The Lodi City Council makes it a policy to invite members of the clergy in Lodi to voluntarily offer a prayer before the beginning of its meetings, for the benefit and blessing of the Council. As the leader of one of the religious congregations with an established presence in the local community, or in your capacity as a chaplain for one of the local fire departments or law enforcement agencies, you are eligible to offer this important service at an upcoming meeting of the Council.*

*If you are willing to assist the Council in this regard, please send a written reply at your earliest convenience to the Clerk to the Council at the address included on this letterhead. Clergy are scheduled on a first-come, first-serve basis. The dates of the Council's scheduled meetings for the upcoming year are listed on the following, attached page. If you have a preference among the dates, please state that request in your written reply.*

*This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the Council requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker.*

*On behalf of the Lodi City Council, I thank you in advance for considering this invitation.*

*Sincerely,  
Lodi City Clerk*

- h. As the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first-serve basis to deliver the prayers.
5. No invocation speaker shall receive compensation for his or her service.
6. The Clerk shall make every reasonable effort to ensure that the eligible invocation speakers that are scheduled for the Council meetings represent a variety of faiths and that the Clerk strive to invite all available faiths from the community. In any event, no invocation speaker shall be scheduled to offer a prayer at consecutive meetings of the Council, or at more than three (3) Council meetings in any calendar year.



7. Neither the Council nor the Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocation speaker.

8. Shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the President of the Council shall introduce the invocation speaker and the person selected to recite the Pledge of Allegiance following the invocation, and invite only those who wish to do so to stand for those observances of and for the Council.

9. In the event that the invocation speaker does not or cannot appear as scheduled, or in the event that no invocation speaker has volunteered or been scheduled for a particular meeting, shortly before the opening gavel that officially begins the meeting and the agenda/business of the public, the President of the Council shall: introduce the person selected to recite the Pledge of Allegiance; announce that the Pledge will be delivered after a moment of silence for individual prayer or reflection; and invite only those who wish to do so to stand for those observances of and for the Council.

10. This policy is not intended, and shall not be implemented or construed in any way, to affiliate the Council with, nor express the Council's preference for or against, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Lodi.

11. To clarify the Council's intentions, as stated herein above, the following disclaimer shall be included in at least 10 point font at the bottom of any printed Council meeting agenda: "Any invocation that may be offered before the official start of the Council meeting shall be the voluntary offering of a private citizen, to and for the benefit of the Council. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the Council, and federal law does not allow the Council to endorse the religious beliefs or views of this, or any other speaker."

**NOW, THEREFORE, BE IT FURTHER RESOLVED** that this policy shall become effective immediately upon adoption by the Council.

THUS INTRODUCED at the regular meeting of the Lodi Council, on \_\_\_\_\_, 2009.

For: \_\_\_\_\_

Against: \_\_\_\_\_

THUS ADOPTED at the regular meeting of the Lodi Council, on \_\_\_\_\_, 2009.

\_\_\_\_\_  
CLERK

\_\_\_\_\_  
COUNCIL PRESIDENT

# **THE ALLIANCE DEFENSE FUND**

## **ATTORNEY-CLIENT AGREEMENT**

1. This Agreement is entered into between The Alliance Defense Fund (hereinafter referred to as "ADF"), and:

City of Lodi; Lodi City Council Members Susan Hitchcock, Larry Hansen, Bob Johnson, Phil Katzakian and Joanne Mounce in their official capacities as members of the Lodi City Council and Larry Hansen in his official capacity as Mayor of the City of Lodi,

(hereinafter referred to collectively as "the Client"), and concerns the legal representation of the Client by ADF in the defense of ADF's model invocation policy adopted by the City of Lodi including any litigation filed against the City of Lodi seeking to declare Lodi's invocation policy based upon ADF's model policy unconstitutional.

2. ADF will supply legal representation at no charge and cover all costs of such representation in the above-referenced case. The Client agrees to cooperate fully with attorney J. Michael Johnson as lead counsel, and its other participating attorneys, including but not limited to Mark C. Bowman and further agrees that said attorneys will collectively have authority to make strategy decisions in matters concerning the legal representation of the Client in such case. ADF shall consult with Client through its City Attorney and keep Client fully apprised of the case progress. No settlement of any nature shall be made without Client's complete approval.

3. If at any point in the litigation of the case ADF and its participating attorneys believe, in their sole judgment, that the Client is not cooperating fully in the case, the Client agrees that ADF and its participating attorneys may withdraw from the case in accordance with applicable canons of professional conduct.

4. It is further agreed that in the event that client should prevail, ADF may collect

CityofLodi.ADFFeeAgreement

and retain any award of fees from the opposing party representing litigation costs and attorney's fees to the extent permitted by law.

5. The Client further agrees not to make any statements to the news media regarding the case without prior approval from and discussion with their attorneys in this matter.

6. It is further agreed that any responsibility ADF has assumed under the terms of this agreement applies only to the period of time that the case referenced above remains in litigation in the trial court. ADF has no obligation by this agreement to represent the Client on further appeal or litigation of this matter, but will reevaluate the case at such time and offer its continued representation on appeal as ADF deems appropriate.

The foregoing Agreement is understood, accepted and agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

**THE ALLIANCE DEFENSE FUND**

By: \_\_\_\_\_  
J. Michael Johnson, Senior Legal Counsel

**CLIENT**

City of Lodi; Lodi City Council Members Susan Hitchcock, Larry Hansen, Bob Johnson, Phil Katzakian and Joanne Mounce in their official capacities as members of the Lodi City Council and Larry Hansen in his official capacity as Mayor of the City of Lodi

By: \_\_\_\_\_  
Title:



# Fax

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**Date:** June 3, 2009

**From:** J. Michael Johnson, Esq.  
Senior Legal Counsel  
LOUISIANA REGIONAL SERVICE CENTER  
P.O. Box 52954  
Shreveport, LA 71135  
Tel. (318) 603-1435  
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[mjohnson@tellADF.org](mailto:mjohnson@tellADF.org)

**To:** Mr. Ken Owen  
209-368-0990

**Pages (including cover):** 17

**Message:** Policies concerning legislative prayer

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J. Michael Johnson  
Senior Legal Counsel



June 2, 2009

Hon. Larry D. Hansen, Mayor  
Hon. Phil Katzakian, Mayor Pro Tempore  
Hon. Susan Hitchcock, City Council Member  
Hon. Bob Johnson, City Council Member  
Hon. Joanne Mounce, City Council Member  
Municipal Offices  
221 W. Pine Street  
Lodi, CA 95340

**RE:** Law regarding public invocations

Dear Mayor Hansen and Council Members,

This letter is being submitted to you by the Alliance Defense Fund ("ADF") to express our support and encouragement of the Lodi City Council's participation in the important American tradition of opening its sessions with a prayer. Recently, elected officials in a number of American cities and counties have received threatening correspondence from groups such as the Freedom from Religion Foundation. These groups have made extraordinary demands for public invocations to be censored or altogether prohibited. We know the Lodi City Council is now facing a similar threat, and we write to assure you that such drastic measures are unnecessary and inadvisable.

By way of introduction, ADF is a not-for-profit legal alliance of more than 1,200 attorneys and like-minded organizations defending the right of people to freely live out their faith. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. We frequently defend these important freedoms in the courts, and through our offices across the country, ADF has been called upon to assist and successfully defend many public officials and legislative bodies on this and a variety of related issues.

## **I. LEGAL ANALYSIS**

There is simply no question that a legislative body may open its sessions with an invocation. Public prayer has been an essential part of our heritage since the time of this nation's founding, and our Constitution has always protected the activity. Contrary to some recent

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claims, such prayer can also include sectarian references without running afoul of the First Amendment's Establishment Clause.

#### A. The Legality of Public **Invocations** is Beyond Dispute.

The United States Supreme Court has acknowledged that official proclamations of thanksgiving and prayer, and invocations before the start of government meetings, are an essential part of our culture and in no way a violation of the Constitution. This has been a consistent principle in First Amendment jurisprudence.

The central case on this subject is *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court invalidated a challenge to the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars. *Marsh* has been repeatedly mischaracterized by some advocacy groups in recent months, but its holding is clear. In the opinion, Chief Justice Burger concluded:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

*Id.*, at 786. In fact, the Court noted that agreement was reached on the final language of the Bill of Rights on September 25, 1789, *three* days *after* those same members of Congress authorized opening prayers by paid chaplains. *Id.*, at 788. Clearly then, 'To invoke divine guidance on a public body . . . is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.' *Id.*, at 792. Those beliefs help define who we are as a nation.

In *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), the Court affirmed that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Justice O'Connor specified that such official references encompass "government practices embracing religion, including Thanksgiving and Christmas holidays, congressional and military chaplains and the congressional prayer room, the motto, the Pledge of Allegiance, and presidential proclamations for a National Day of Prayer." *Id.*, at 693 (concurring opinion). She explained, "Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*

Thirty years before *Marsh* was decided, Justice Douglas famously observed, "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public

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events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to *their* spiritual needs.” *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). The Court held that the Establishment Clause does not prohibit “[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a national holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, [and] our public rituals . . . [including] the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’” *Id.*, at 312-13. Ninety-one years before *Marsh*, the Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that America had a “custom of opening sessions of all deliberative bodies and most conventions with prayer. . .” *Id.*, at 471. By simply following these traditions, government officials run no risk of violating the Constitution.

#### B. Sectarian Prayers are Likewise Historical and Constitutionally Permissible.

Recently, some activist groups have implied that all sectarian references in public invocations are unlawful. To the contrary, the Constitution does *not* require such censorship. Although the Supreme Court has not directly addressed the question, close reading of the case law indicates that *Marsh* and its progeny permit sectarian invocations. What matters most to the courts is the *context* of legislative prayers—rather than the specific *content* of any particular invocation.

In short, the rule of thumb is that the government cannot compel someone to pray in accordance with one preferred religious viewpoint. For this reason, a policy which mandates only “nonsectarian” prayer would itself likely be unconstitutional. Instead, public bodies are much safer when they provide an open forum for individuals to offer prayer according to the dictates of their own consciences. This may work best on a rotational basis. Under such a policy, the viewpoint expressed—whether sectarian or nonsectarian—is then left to the individual prayer-giver, rather than the government.

##### 1. Supreme Court cases.

In *Marsh*, the Supreme Court gave no indication that the mere mention of a sectarian deity or belief would violate the Establishment Clause. Instead, the Court reviewed and relied upon overtly sectarian prayers as examples of permissible public invocations. See *Marsh*, 463 U.S. at 794-95; *McCreary County v. ACLU of Ky.*, 125 S.Ct. 2722, 2733, n. 10 (2005). The *Marsh* Court did not issue an opinion on whether it would be unconstitutional for prayers to be offered in Jesus’ name (or in the name of any other specific deity) since that issue was not before the Court. *Marsh*, 463 U.S. at 793, n. 4. However, the Court did reference the prayers delivered at the Continental Congress and the Constitutional Convention as examples of what would and should be historically and traditionally permitted. *Id.* at 791-92. Included in those example prayers were invocations brought in the name of Jesus, by invited guests.

For example, the *Marsh* Court reviewed and discussed the opening of the first session of the Continental Congress with prayer, and concluded that “the subject was considered carefully

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and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Id.* The prayer at that first session of the Congress, September, 7, 1774, in ~~Carpenter's~~ Hall, Philadelphia, was delivered by Rev. Jacob Duché. He included these words (emphasis added):

Be Thou present; O God of Wisdom, and *direct the councils of this Honorable Assembly: enable them to settle all things on the best and [surest] of foundations: that the scene of blood may be speedily closed: that Order, Harmony and Peace may be effectually restored, and Truth, and Justice, Religion, and Piety prevail and flourish among the people. Preserve the health of their bodies and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and Our Savior, Amen.*<sup>1</sup>

The content of Rev. Duché's prayer is virtually indistinguishable from the content of the typical opening prayer at any public meeting in America today. If the above prayer was reviewed with approval and referenced by the Supreme Court in *Marsh*, then it, and prayers like it, should certainly be appropriate today as well. Neither *Marsh* nor any other Supreme Court case commands removal of all sectarian references from public prayer—particularly where different persons of varying creeds take turns offering the prayer.

## 2 Lower court cases.

Numerous appellate and district courts that have had occasion to apply *Marsh* have found no trouble with sectarian prayers—so long as they are not exploited and used for proselytizing. These lower courts have rightfully focused on the key guideline provided by *Marsh*:

*The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.*

*Id.*, at 794-795 (emphasis added).

For example, the U.S. Court of Appeals for the Tenth Circuit has stated that "the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause." *Snyder v. Murray*, 159 F.3d 1227, 1234, n.10 (10<sup>th</sup> Cir. 1998). In that case, the court held that a city council could lawfully bar a speaker because he would "proselytize" his own views and "disparage" others by offering a mock, unconventional "prayer." Applying *Marsh*,

<sup>1</sup> September 7, 1774, *First Prayer in Congress: Beautiful Reminiscence* (Washington, D.C. Library of Congress); WILLIAM J. FEDERER, *America's God and Country: Encyclopedia of Quotations* (Coppell, TX Fame Publishing, Inc., 1994), p.137; GARY DEMAR, *God and Government: A Biblical and Historical Study* (Atlanta, GA American Vision Press, 1982), Vol. I, p. 108; JOHN S.C. ABBOTT, *George Washington* (New York, NY Dodd, Mead & Co., 1875, 1917), p.187; REYNOLDS, *The Maine Scholars Manual* (Portland, ME Dresser, McLellan & Co., 1880).



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the court observed: "The kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that *aggressively advocates* a specific religious creed, or that *derogates another* religious faith or doctrine." *Id.*, at 1234 (emphasis added). Specifically addressing what it means to "advance" a particular faith under *Marsh*, the court found that, "All prayers 'advance' a particular faith or belief in one way or another. . . By using the term 'proselytize,' the [*Marsh*] Court indicated that the real danger in this area is effort by the government to *convert* citizens to particular sectarian views." " *Id.*, 1234, n.10 (emphasis added),

In the Fourth Circuit, the court recently approved a legislative prayer practice in which various clergy in a county's religious community were invited to present invocations during meetings of the county board. In that case, *Simpson v. Chesterfield County Bd. & Supervisors*, 404 F.3d 276 (4<sup>th</sup> Cir. 2004), *cert. denied*, 126 S.Ct. 426 (2005), the court found it important that the County "made plain that that it was not affiliated with any one specific faith by opening its doors to a wide pool of clergy." *Id.*, 404 F.3d at 286. The court did not, however, seem to reason that such a provision was an absolute prerequisite to the invocation practice's constitutionality, nor did it invoke the language of its earlier broad pronouncement in *Wynne v. Town & Great Falls*, 376 F.3d 292 (4<sup>th</sup> Cir. 2002), *cert. denied*, 125 S.Ct. 2990 (2005); that any reference to a particular deity is constitutionally impermissible.

The reason the *Wynne* case was easily distinguishable from *Simpson*, and from most other situations, is because the town council in *Wynne* exclusively invoked Jesus' name and also publicly chided the plaintiff for failing to stand and participate in the prayers. *Wynne* presented a genuinely exploitative situation where a town council "insisted upon invoking the name 'Jesus Christ' to the exclusion of other deities associated with any other particular religious faith." *Wynne*, 376 F.3d at 295, 301. Obviously, such action may be deemed by a reviewing court as "exploiting" the invocation to "proselytize or advance Christianity." The Fourth Circuit's injunction against proselytizing town council prayers in *Wynne* thus does not fairly implicate all non-proselytizing prayers in that circuit. In fact the court later clarified in *Simpson*:

The facts of *Wynne* [ ] contrast sharply with those in the present case. The insistent sectarianism of the Great Falls prayers, see *Wynne*, at 294-96 & n. 2, violated even the spacious boundaries set forth in *Marsh*. [By contrast] Chesterfield's policy, adopted in the immediate aftermath of *Marsh*, echoes rather than exceeds *Marsh*'s teachings. The County never insisted on the invocation of Jesus Christ by name, as the Town Council in Great Falls did. *Wynne*, at 301.

*Simpson*, 404 F.3d at 283.

The Fourth Circuit further specified that, "A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation." *Id.*, at 285.

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The Ninth Circuit, which includes California, apparently agrees. While the Ninth Circuit has yet to issue any ruling specifically on point regarding legislative prayer, in *Bacus v. Palo Verde School Board*, unpublished-2002 WL 31724273 (9<sup>th</sup> Cir. 2002), the court held "We need not decide whether the prayers 'in the name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations." *Id.* at 1.

One previous state court case in California provides additional caveats. But even in that case, *Rubin v. City of Burbank*, 101 Cal.App.4<sup>th</sup> 1194 (Cal.App. 2 Dist., 2002), the California Court of Appeal, Second District recognized the continued vitality and applicability of *Marsh*. In *Rubin*, the court held that an invocation offered to a sectarian deity violated the Establishment Clause because it conveyed a message that said deity was being advanced over other religions. However, the court's opinion was based in part on the facts that the speakers selected to give the invocation were chosen from a single ministerial association that had no members of minority faiths, and the invocation at issue was part of the official agenda of the council meeting.

The *Rubin* case has no direct applicability to your situation, since Lodi is part of a different appellate district in California. However, to be even more safe, the model policy that we offer for your review (explained more fully below) includes important safeguards to avoid the "endorsement" or "advancement" concerns expressed by the *Rubin* court. Specifically, our model policy includes: a truly open and neutral invitation process (to all religious leaders in the community); use of a written disclaimer; removal of the invocation from the formal agenda; etc.

With regard to prayer content, the Ninth Circuit's reference to Congressional invocations is important. Clearly, prayers offered before Congress often contain explicit sectarian references. See *Newdow v. Bush*, 355 F.Supp.2d 265, 285 n. 23 (D.D.C.2005) (acknowledging that "the legislative prayers at the U.S. Congress are overtly sectarian"); see also Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L.REV. 2083, 2104 at n.118 (1996) (noting that, from 1989 to 1996, for example, "over two hundred and fifty opening prayers delivered by congressional chaplains[ ] included supplications to Jesus Christ").

The Eleventh Circuit recently upheld non-proselytizing but sectarian county commission meeting prayers in Jesus' name. *Gary Pelphrey, a.k.a. Bats, et al v. Cobb County, Georgia, et al*, 547 F.3d 1263 (11th Cir., Oct. 28, 2008). In that case, the federal district court below actually arrived at some helpful standards for reviewing a legislative prayer, and looked to whether the public officials had an "impermissible motive or intent" to proselytize only one faith, or to show "purposeful preference of one religious view to the exclusion of others." *Pelphrey v. Cobb County, Ga.*, 410 F.Supp.2d 1324, 1338 (N.D. Ga., Jan. 13, 2006). Below this type of threshold, the courts have consistently disclaimed *my* interest in the content of legislative invocations, announcing a strong disinclination "to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, 463 U.S. at 794-795. "Whether invocations of 'Lord of Lords' or 'the God of Abraham, Isaac and Mohammed' are 'sectarian' is best left to theologians, not courts of law." *Pelphrey*, 547 F.3d at 1267.

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Recently, in *Dobrich v. Walls*, 380 F.Supp.2d 366 (D. Del., Aug. 2, 2005), the federal district court in Delaware reviewed and specifically approved as constitutional the prayer policy of a public school board where the policy allowed for opening prayers, even though representatives were predominately of one faith tradition and there was occasional sectarian content in the prayers. As that court explained, “As the *Marsh* decision makes clear, the practice of opening legislative sessions with a prayer is acceptable under the Constitution.” *Id.*, at 377. The *Dobrich* court found it persuasive that in *Marsh*, “[t]he Court went on to find no violation of the Establishment Clause based on the fact that the clergyman offering the prayers was from one denomination, used Judeo-Christian prayers, and was paid at the public expense.” *Id.*, at 376.

### C. The Government Must Avoid “Comparative Theology.”

It is indeed an important principle that government officials *cannot* “assume the role of regulators and censors of legislative prayer.” *Pelphrey*, 410 F.Supp.2d at 1339. As that court summarized:

it would seem anomalous for the outcome of the *Marsh* inquiry to turn on the obviousness or subtlety of the sectarian references in question; such a rule would create the perverse incentive for speakers to endeavor to couch sectarian concepts in opaque terms, and place courts in the unenviable position of determining just how “obvious” a sectarian reference has to be before it must be excised from legislative invocations, even when not otherwise offensive to *Marsh*’s prohibition against proselytization, advancement, or disparagement.

*Id.*, at 1338, n.14.

After a recent controversy at the Ohio House of Representatives, we were asked to submit ADF’s legal opinion on whether a suggested policy of reviewing invocations prior to their delivery, and mandating only “nonsectarian” content, would be constitutional. We wrote to explain that such a prior restraints on free speech would be constitutionally impermissible, and that the Supreme Court has counseled against the efforts of government officials to affirmatively screen, censor, prescribe and/or proscribe the specific content of public prayers offered by private speakers, as such government efforts would violate the First Amendment rights of those Speakers. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 588-589 (1992). Thankfully, the Speaker of the House, Rep. Jon Husted, wisely corrected the situation and committed in a September 10, 2007, memo: “As such, while the Ohio House of Representatives is under my leadership we will not censor the content of prayers given prior to a House session.”

The Ohio House made the right legal decision. In *Lee*, Justice Souter remarked, “I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible” than “comparative theology.” *Id.* at 616-17 (Souter, J., concurring). The legislative branch of government, like the judicial, is prohibited from divining the “religious” from the “non-religious,” and must avoid sifting through individual prayers to subjectively determine whether or not an invocation would be “sectarian.” Because

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such editorial endeavors would offend constitutional guarantees under both the Free Exercise Clause and the Establishment Clause, they are clearly prohibited by Supreme Court precedent.

Examples of this precedent include: *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify if it is "pervasively sectarian" is offensive and contrary to precedent); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 843-44 (1995) (rejecting argument that university should distinguish between evangelism, on the one hand, and the expression of religious views on secular subjects, on the other); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem should government attempt to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); *Id.* at 344-45 (Brennan, J. concurring) (same); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n. 6, 272 n. 11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Rusk v. Espinosa*, 456 U.S. 951 (1982) (mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

## II. MODEL POLICY AND OFFER OF PRO BONO DEFENSE

Attached to this letter is a model invocations policy ("Policy") that we respectfully present for consideration by your local leaders. The Policy is similar to the ones that ADF has drafted at the request of many other public bodies nationwide, to provide a constitutional mechanism to preserve the longstanding tradition of allowing public meetings to be opened with a prayer. The Policy avoids government censorship and entanglement in religion, and ensures that invocations will be offered according to the dictates of the conscience of each prayer-giver, as the First Amendment requires.

We strongly believe that this Policy will pass constitutional muster. For that reason, if your City Council ultimately adopts the Policy as proposed, and later faces any legal challenge to it—ADF hereby offers to defend the public body and its Policy free of charge.

In his Farewell Address on September 19, 1796, President Washington famously admonished, "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. ... The ~~mere~~ Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity." It is both lawful and wise for public officials to respect and cherish our religious heritage, and to invoke God's protection and guidance over their public work and our nation.

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We trust that this information will be helpful to you and your local leaders. If we can answer any questions or concerns as you and/or your city officials review these materials, please do not hesitate to contact me.

Very sincerely yours;

ALLIANCE DEFENSE FUND



J. Michael Johnson  
Senior Legal Counsel

JMJ/pg  
Attachment (model policy)

**DRAFT**

**POLICY REGARDING OPENING INVOCATIONS  
BEFORE MEETINGS OF THE LODI CITY COUNCIL**

---

WHEREAS, *the* Lodi City Council ("the Council") is an elected legislative and deliberative public body, serving the citizens of Lodi, California, and

WHEREAS, the Council has long maintained a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council wishes to maintain a tradition of solemnizing its proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the Council; and

WHEREAS, the Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

WHEREAS, our country's Founders recognized that we possess certain rights that cannot be awarded, surrendered, nor corrupted by human power, and the Founders explicitly attributed the *origin* of these, our inalienable rights, to a Creator. These *rights* ultimately ensure the self-government manifest in our Legislature, upon which we desire to invoke divine guidance and blessing; and

WHEREAS, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected a challenge to the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars, and specifically concluded, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.*, at 786; and

WHEREAS, the Council desires to avail itself of the Supreme Court's recognition that it is constitutionally permissible for a public body to "invoke divine guidance" on its work. *Id.*, at 792. Such invocation "is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*; and

WHEREAS, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.*, at 675; and

WHEREAS, the Supreme Court further stated, that “government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society, For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.” *Id.* at 693 (O’Connor, J., concurring); and

WHEREAS, the Supreme Court also famously observed in *Zorach v. Clauson*, 343 U.S. 306, (1952), “We are a religious people whose institutions presuppose a Supreme Being.” *Id.* at 313-14; and

WHEREAS, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 US. 457 (1892), that the American people have long followed a “custom of opening sessions of all deliberative bodies and most conventions with prayer...,” *Id.* at 471; and

WHEREAS, the Supreme Court has determined, “The content of [such] prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794-795; and

WHEREAS, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies “to embark on a sensitive evaluation or to parse the content of a particular prayer” offered before a deliberative public body. *Id.*; and

WHEREAS, the Supreme Court has counseled against the efforts of government officials to affirmatively screen, censor, prescribe and/or proscribe the specific content of public prayers offered by private speakers, as such government efforts would violate the First Amendment rights of those speakers. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 588-589 (1992); and

WHEREAS, in *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9<sup>th</sup> Cir. 2002), the United States Court of Appeals for the Ninth Circuit recognized the continued vitality of *Marsh* and its applicability to analyzing the constitutionality of legislative prayer; and

WHEREAS, the Ninth Circuit held that prayer before deliberative bodies must not “disparage other religious faiths,” “proselytize,” nor “advance any one...faith or belief.” *Id.* at 357 (quoting *Marsh*, 463 U.S. at 794-95.); and

WHEREAS, the Council intends to avoid all of the unique circumstances that rendered the practices at issue in *Bacus* unconstitutional, including the facts that:

1) The prayer before meetings was “almost always” offered “in the Name of Jesus,” despite objection from the community. *Id.* at 356; and

2) The persistent invocations “in the Name of Jesus,” “necessarily ha[d] the effect of ‘making adherence to a religion relevant’ to... ‘standing in the political community.’” *Id.* at 357; and

3) Such continued and “regular” Christian invocations, to the exclusion of all others, provided Christianity “with a special endorsed and privileged status...” *Id.*; and

4) The same individual almost always offered the invocation, and “no individuals of other religions ever gave the invocation.” *Id.* at 356-57; and

5) The prayer practice was thus not conducted “as is traditional in Congress,” where invocations are “rotated among leaders of different faiths, sects, and denominations.” *Id.* at 356 (citing *Marsh*, 463 U.S. 783 n.13.); and

WHEREAS, in *Rubin v. City of Burbank*, 101 Cal.App.4<sup>th</sup> 1194 (Cal.App. 2 Dist., 2002), the California Court of Appeal, Second District recognized the continued vitality of *Marsh* and its applicability to analyzing the constitutionality of legislative prayer; and

WHEREAS, the *Rubin* Court held that an invocation offered to a sectarian deity violated the Establishment Clause because it conveyed a message that said deity was being advanced over other religions. *Id.* at 1204;

WHEREAS, the Council intends to avoid those particular circumstances that rendered the practices at issue in *Rubin* unconstitutional, including the facts that:

1) The speakers selected to give the invocation were chosen from a single ministerial association that had no members of the Muslim, Buddhist, Hindu or Bahai faiths. *Id.* at 1198; and

2) The invocation at issue was part of the official agenda of the council meeting. *Id.* at 1207; and

WHEREAS, the Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

WHEREAS, the Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, the Council accepts as binding the applicability of general principles of law and all the rights and obligations afforded under the United States and California Constitutions and statutes.



**NOW, THEREFORE, BE IT RESOLVED** by the City Council of Lodi, California, that the Council hereby adopts the following written policy regarding opening invocations before meetings of the Council, to wit:

1. In order to solemnize proceedings of the Lodi City Council, it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council.

2. The prayer shall not be listed or recognized as an agenda item for the meeting or as part of the public business.

3. No member or employee of the Council or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

4. The prayer shall be voluntarily delivered by an eligible member of the clergy in the City of Lodi [OR County?]. To ensure that such person (the "invocation speaker") is selected from among a wide pool of the [city's OR county's] clergy, on a rotating basis, the invocation speaker shall be selected according to the following procedure:

a. The Clerk to the Lodi City Council (the "Clerk") shall compile and maintain a database (the "Congregations List") of the religious congregations with an established presence in the local community of the Lodi [OR whole county?].

b. The Congregations List shall be compiled by referencing the listing for "churches," "congregations," or other religious assemblies in the annual Yellow Pages phone book(s) published for Lodi [OR county?], research from the Internet, and consultation with local chambers of commerce. All religious congregations with an established presence in the local community of Lodi [OR county?] are eligible to be included in the Congregations List. Any such congregation not otherwise identified for participation may request its inclusion by specific written communication to the Clerk.

c. This policy is intended to be and shall be applied in a way that is all-inclusive of every diverse religious congregation in community of Lodi [OR county?]. The Congregations List is compiled and used for purposes of logistics, efficiency and equal opportunity for all of the community's religious leaders, who may themselves choose whether to respond to the Council's invitation and participate. Should a question arise as to the authenticity of a religious congregation, the Clerk shall refer to criteria used by the Internal Revenue Service in its determination of those religious organizations that would legitimately qualify for Section 501(c)(3) tax-exempt status.

d. The Congregations List shall also include the name and contact information of any chaplain who may serve one or more of the fire departments or law enforcement agencies of Lodi [OR county?].

e. The Congregations List shall be updated, by reasonable efforts of the Clerk, in November of each calendar year.

f. Within thirty (30) days of the effective date of this policy, and on or about December 1 of each calendar year thereafter, the Clerk shall mail an invitation addressed to the "religious leader" of each congregation listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.

g. The invitation shall be dated at the top of the page, signed by the Clerk at the bottom of the page, and read as follows:

*Dear religious leader,*

*The Lodi City Council makes it a policy to invite members of the clergy in Lodi [OR county?] to voluntarily offer a prayer before the beginning of its meetings, for the benefit and blessing of the Council. As the leader of one of the religious congregations with an established presence in the local community, or in your capacity as a chaplain for one of the local fire departments or law enforcement agencies, you are eligible to offer this important service at an upcoming meeting of the Council.*

*If you are willing to assist the Council in this regard, please send a written reply at your earliest convenience to the Clerk to the Council at the address included on this letterhead. Clergy are scheduled on a first-come, first-serve basis. The dates of the Council's scheduled meetings for the upcoming year are listed on the following, attached page. If you have a preference among the dates, please state that request in your written reply.*

*This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the Council requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker.*

*On behalf of the Lodi City Council, I thank you in advance for considering this invitation.*

*Sincerely,  
Clerk to the Council*

REMARKS BY MARK C. BOWMAN  
OF ALLIANCE DEFENSE FUND  
September 30, 2009  
Invocations at City Council Meetings

I. INTRODUCTION

- A. There is no more important issue for government than protecting civil liberties; our first liberty is that of religion
- B. Issue: should the City Council allow invocations and, if so, what rules should govern them?
- C. A carefully written policy that permits uncensored invocations is the best strategy to respect all faiths and satisfy the constitution

II. IS TOLERANCE GIVING VOICE TO ALL FAITHS **OR** TO NONE?

III. CASES REGARDING LEGISLATIVE INVOCATIONS (ATTACHED)

- A. Each ruling is limited to the circumstances of the case
- B. Each case reveals what is permissible in that set of circumstances
- C. Uncensored prayers are permissible given the right circumstances
- D. The disparity between case results is less about the law and more about the particular circumstances surrounding the invocation

IV. ALLIANCE DEFENSE FUND'S MODEL PRAYER POLICY

- A. Includes all but one of City Attorney's recommended provisions
- B. Benefits
  - 1. Keeps City Council out of "policing" prayers; 11<sup>th</sup> Circuit: *"Who decides what is sectarian and how?"*
  - 2. Most inclusive
    - a. All religious faiths
    - b. No religious faith [Add City Attorney's recommended provision 4) d.]
  - 3. Prohibits endorsement of any faith or belief by the City
  - 4. Prohibits proselytizing and disparaging any faith or non-faith
  - 5. Pluralistic rather than secular; censorship is the real intolerance

6. Synthesis of all legislative invocation cases; policy does not require that Lodi reverse any prior rulings or set new precedent
7. Considered "facially valid by only federal court to review
8. Adopted by cities across country and in California; Turlock voted 5-0 to adopt ADF's Model policy
9. 11 local attorneys have submitted petitions to the City Council supporting uncensored prayer

V. ADF ~~IS~~ WILLING TO DEFEND ITS POLICY PRO BONO

A. Protecting religious liberty since 1994

1. 1200 Attorneys and 300 supporting organizations
2. Protecting religious liberty since 1994
3. 82% success rate in court
4. Further information attached

B. It is in ADF's interest to recommend a policy that will be upheld

VI. INDEMNIFICATION

A. Non-profit public interest law groups are not insurers and have ethical and tax exempt status limitations on fundraising for others

B. "Citizen Alliance" formed in Winston Salem, NC to raise funds

C. Citizens for Uncensored Prayer is initiating effort to raise funds

D. Threat of litigation questionable

1. Courts look for "diversity" of faiths and protections against proselytizing or disparaging
2. Lodi is a diverse community –Sikhs, Muslims, Hindus, Buddhists, Jews, Pagans, Agnostics and Atheists; diverse communities make a difficult battleground for anti-prayer groups to argue that there is an establishment of religion
3. ADF's policy, if followed, protects against proselytizing or disparaging

## LEGISLATIVE INVOCATIONS

CASE NAME	COURT	DATE	FACTS	ISSUE	HOLDING
<i>Pellphrey v. Cobb County</i> 547 F. 3d 1263	11 Circuit	2008	Sectarian prayers opened county commission meetings; diverse faiths on rotating basis	Whether Establishment Clause permits only nonsectarian prayers	No. Content of prayer is of no concern to judges where there is no indication of proselytizing or disparagement
<i>Turner v. City Council of Fredicksburg</i> 534 F. 3d 352	4 <sup>th</sup> Circuit	2006	Prayers limited to city council members; public asked to stand; agenda item	Whether council member has right to give sectarian prayer as part of council meeting agenda	No. Council member's prayer, as part of agenda, is government speech and therefore restricted; "we need not decide whether Est. Clause compelled [nonsectarian] prayer because the Est. Clause does not absolutely dictate form of legislative prayer." ( <i>Id.</i> 356)
<i>Simpson v. Chesterfield County</i> 404 F. 3d 276	4 <sup>th</sup> Circuit	2005	Witch challenged refusal of county board of supervisors to allow her to participate in nonsectarian invocations	Whether every religious "leader" is entitled to be included in list of invocants created by board	No. As long as method of creating list of invocants satisfies <u>Marsh</u> , governing board not required to include every religious leader in community
<i>Wynne v. Town of Great Falls</i> 376 F. 3d 292	4 <sup>th</sup> Circuit	2004	City council prayers always led by same council member who invoked name of Jesus in which everyone stood and bowed	Whether limiting invocations to single council member violate Establishment Clause	Yes. Legislative prayers cannot affiliate government with one specific faith or belief in preference to all others

<i>Rubin v. City of Burbank</i> 401 Cal. App. 4th 1194	Second District Ct. Appeals (CA)	2002	Sectarian invocations given by group limited to ministerial association. No written policy. No diversity of faiths; The only faith identified by invocations was Christianity	Whether city's practice was permissible under <u>Marsh</u>	No. Specific references to Jesus are clearly sectarian and imply preference.  VOTE: <i>Rubin</i> never states that reference to Jesus would always be impermissible; only that in the context of the facts before the court, reference to Jesus caused the "prayer opportunity to be exploited to advance one faith, Christianity, over another."
<i>Bacus v. Palo Verde Unified School Dist.</i> (unpublished) 52 Fed. Appx. 355	9 <sup>th</sup> Circuit	2002	Invocations before school board meetings given by same individual, ended in the name of Jesus and excluded other faiths	Whether legislative invocations can be identified only with a single faith	No. CAVEAT: "We need not decide whether prayers in the name of Jesus would be an impermissible solemnization of a legislature like body, provided that invocations were, <b>as</b> traditional in congress, rotated among leaders of different faiths, sects and denominations ( <i>Id.</i> at 1)
<i>Coles v. Cleveland Board of Education</i> 171 F. 3d 381	6 <sup>th</sup> Circuit	1999	Invocations before school board	Do invocations in context of public education remove	Yes.

<i>Snyder v. Murray</i> 159 F. 3d 1227	10 <sup>th</sup> Circuit	1998	City council refused to allow applicant to pray invocation that council viewed as proselytizing and disparaging	Does city council have authority to prohibit invocations that proselytize and disparage?	Yes.
<i>Marsh v. Chambers</i> 463 U.S. 783	U.S. sup. Ct.	1983	Nebraska legislature used paid Christian chaplain and published prayer books at public expense <b>to</b> give opening invocation before each session	Whether Establishment Clause prohibited legislature's practice	Because opening legislative sessions with prayer is embedded in "unique history" and tradition of our country legislative prayers are excluded from Establishment Clause disability rendering them constitutionally permissible as long as prayers do not proselytize or disparage ( <i>Id.</i> at 794-95.)



## **FACT SHEET**

### ***ADF defending public prayer against nationwide secularist assault***

#### ***ADF defending public prayer against nationwide secularist assault***

Prayer at public events is a cherished, and unbroken, tradition in American history. Despite the explicit approval of public invocations and prayer proclamations by the very people who founded this country, ***even those who wrote the Constitution***, the Left has been on a nationwide search-and-destroy mission to eliminate this long-standing and well-loved practice.

““Secularist hypocrisy — While the ACLU and Americans United have been attacking Christian prayer, they have defended a Wiccan who wanted to deliver an invocation.—Secularist hypocrisy”””

***Nationwide Assault:*** The ACLU, Americans United for the Separation of Church and State, FFRF and others have been preying on small towns and counties across America in hopes of intimidating them, through the threat of litigation, to end the tradition of opening public events with prayer. Sadly, many have surrendered. However, ***ADF has been on the move and ready with constitutionally-correct legal advice that has helped numerous cities and other public bodies stand strong against the secularist assault.***

- In 2007, **ADF** sent letters to more than **20,000 city** councils outlining a constitutionally-sound model prayer policy and offering free legal defense should they adopt the policy and face threats from anti-prayer groups.
- In South Carolina, the state legislature recently passed the ADF-drafted “Public Invocations Act,” a statute to confirm that state and local bodies may continue the long-standing tradition of opening meetings with prayer.
- ADF was instrumental in the Ohio legislature’s reversal of a policy that would have subjected prayers to review and censorship.
- ADF is also currently defending several government bodies on the issue, including a rural school board in Louisiana, which has been attacked repeatedly by the ACLU for a decade for the “crime” of opening their meetings up with prayer.
- ***In 2005, then-head of the ACLU of Louisiana Joe Cook likened this school board to al-Qaeda for fighting to continue prayer.***

#### ***ABOUT Mike Johnson***

Mike Johnson serves as senior legal counsel with the Alliance Defense Fund at its Louisiana Regional Service Center in Shreveport, where he has litigated and won numerous high-profile religious liberty cases nationwide and has been a principal drafter of pro-life and pro-family legislation for many states and municipalities. ***Johnson was appointed in 2008 to the Louisiana Commission on Marriage and Family by Louisiana Gov. Bob Jindal.*** Joining ADF in 2002, he is a member of the Louisiana **Bar** and has been admitted *pro hac vice* to many federal district and appellate courts across the country. He has become a regular feature on **Fox** News, CNN, ABC, CBS, MSNBC, **TIME** magazine, **Citizen** magazine, **World** magazine, and major newspapers across the country. Practicing law since 1999, Johnson earned his J.D. from Louisiana State University.





## INTERVIEW RESOURCE SHEET

**Topic:** *ADF defending public prayer against nationwide secularist assault*

***Current ADF cases/interventions:***

- **Forsyth County, NC**
  - ACLU and Americans United file suit to eliminate invocation at county commission meetings
  - ***Board voted to retain ADF as counsel*** and continue litigation rather than folding
- **Greece, NY**
  - Americans United sued to halt opening prayers on the basis that their two clients felt like “outsiders”
  - **ADF** represents the Greece City Council
- **Tangipahoa Parish, LA**
  - **ADF** successfully defended the right of the Tangipahoa Parish School Board to open its meeting with prayer.
  - A full panel of the 5<sup>th</sup> Circuit threw out the ACLU lawsuit on standing, limiting future use “offended observer” strategy
  - The ACLU has since filed another suit, ***its sixth*** against the school board in an attempt to silence opening prayer
  - ***Most recently, a federal court agreed with the school board on the crucial legal issues in the case and acknowledged that uncensored prayer before public bodies in America is an important tradition that can continue.***

**National Day of Prayer/ Public Invocations Historical Facts**

- The tradition of designating an official day of prayer actually began with the ***Continental Congress in 1775.***
- ***On October 3, 1789, President George Washington issued a National Day of Thanksgiving Proclamation,*** “to be devoted by the people of these United States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,” so that “we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him . . . to promote the knowledge and practice of true religion and virtue . . .”
- In 1952, ***President Harry Truman*** signed into law a joint resolution by Congress to “set aside an appropriate day as a National Day of Prayer.”
- In 1988, the law was amended by Congress and signed by ***President Ronald Reagan*** to specify that the annual event should be observed on “the first Thursday in May in each year.”

To the Lodi City Council,

Members of the City Council, thank you for giving the religious minority an equal ground on which to speak this evening. My name is David Diskin, and I am a Lodi resident of 14 years, a home-owner, a small business owner, a recipient of the Lodi Volunteer of the Year award (in this very same room), and an atheist.

But tonight isn't about my choice of religion, or yours, it's about the beautiful diversity that Lodi enjoys. We are overwhelmingly Christian, but we cannot forget the growing community of Muslims, Sikh, and non-believers. We have Jews, Hindu, and Buddhists. We have wiccans, pagans, and scientologists. Lodi is *certainly* a melting pot.

Tonight you'll decide what's best for this melting pot, You've been asked by the people you represent to find a solution for which there is no easy answer. I would like to offer you five points to consider as you make your decision tonight:

- 1) Lodi does not have money to defend a faith-based decision in court. We may have offers of free representation, but there are no offers of indemnification. Should we lose that battle, it is the tax payers who will pay for your decision to allow prayer.
- 2) Encouraging prayer from all religions *sounds* perfect, but many faiths do not practice public prayer or involve themselves with city business. And based on the last two years, an overwhelming majority of invocations will still continue to be Christian - except now they'll be able to mention Jesus while putting the city at risk.

- 3) Prayer reminds many people of the conflicts caused directly by religion. This includes excommunication from their families, the hatred towards homosexuality, the oppression of women's rights, sexual abuse from religious leaders, and other examples of intolerance.
- 4) Holding an invocation two minutes *prior* to the gavel, rather than two minutes *after*, is not a solution. Are non-Christians expected to wait in the lobby until the meeting officially starts? Imagine the looks they would get when entering the council chambers post-prayer. This skirts the issue and still provides an opportunity for division.
- 5) Citizens who wish to pray have a variety of places to do so already. This includes church, home, and even in their cars. But a tax-funded building, in a public meeting, for government issues, intended for all citizens is not a venue for prayer.

If you personally desire prayer, I ask that you hold it in private chambers prior to the public meeting.

If you feel strongly that the public need prayer as well, let them have a moment of silence to pray to their own, personal god.

But as a citizen of a community that supports tolerance and equality, I cannot fathom why a city council would sanction prayer and subject its diverse citizens to hear it.

Thank you,  
-David Diskin